Filed 5/16/07 Lang v. Roche CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ERIK E. LANG, Plaintiff and Appellant, v. WARREN W. ROCHE, Defendant and Respondent.	B192213 (Los Angeles County Super. Ct. No. SC079699)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patricia L. Collins, Judge. Reversed and remanded.

Erik E. Lang, in pro. per., for Plaintiff and Appellant.

Warren W. Roche, in pro. per., for Defendant and Respondent.

Plaintiff seeks relief from a default judgment taken against him in a libel suit, on the grounds of insufficient service of the summons and complaint. At trial, plaintiff testified that he was not served with the libel suit, though he is defendant's next-door neighbor, and defendant has known plaintiff's mailing address since 1977. The evidence showed that defendant applied for a court order allowing service by publication, using a misspelling of plaintiff's name.

The trial court granted judgment in favor of defendant at the close of plaintiff's case, ostensibly because plaintiff did not show "why service was bad." The court apparently believed that plaintiff had to prove a negative—that he was *not* served—instead of obliging defendant to prove that plaintiff was properly served. We reverse.

FACTS

This is the second appeal in this case. In his prior appeal, appellant Erik Lang challenged the dismissal of his lawsuit after demurrers were sustained without leave to amend. (*Lang v. Roche* (Jul. 27, 2005, B176388) [nonpub. opn.].) We determined that Lang adequately alleged facts that, "if proven at trial," would establish that Lang's neighbor, respondent Warren Roche, obtained a 1996 default judgment against Lang as a result of a due process violation, i.e., "because there was no legally sufficient service of the summons." Lang alleged that Roche sued him for libel under the misspelled name "Eric Lang," served process by newspaper publication under the name "Eric Lang," and obtained judgment against "Eric Lang." Roche levied upon appellant's property to satisfy the judgment he obtained by default. We reversed the dismissal and remanded the case for trial on appellant's claim for equitable relief from the default judgment.

The matter was tried by the court on April 18, 2006. Appellant testified that his name is spelled "Erik Lang." Appellant introduced into evidence a copy of escrow instructions showing his purchase of real property from Roche in 1977. The instructions, signed by both parties, show that appellant took title to the property as Erik Lang, and that his mailing address is P.O. Box 908 in Topanga Canyon. Appellant testified that his mailing address remains the same.

Lang stated that Roche sued him for libel in an earlier lawsuit, in 1989. Roche's first libel suit spelled appellant's name as "Erik Lang." Roche served appellant with a notice regarding a meet and confer conference in 1992. Roche misspelled appellant's name as "Eric," but served the notice at appellant's correct post office box. Roche served Lang with a small claims demand in 1991, in which he again misspelled appellant's first name, but gave notice to Lang at his correct mailing address in Topanga. Lang responded to Roche's demand with a cross-claim, in September 1991. Lang's response gave the correct spelling of his name.

Lang introduced into evidence a copy of an "application for order for publication of summons on complaint" for Roche's 1995 libel suit, which refers to appellant as "Eric Lang." Roche asked the court to order service of summons by newspaper publication using that name. Roche's then-attorney, Samuel Rees, declared that Lang resides in Topanga Canyon, "within eyesight" of respondent Roche; however, the county sheriff was unable to serve Lang at his residence. In seeking service by publication, Rees advised the court, "I am not aware of any other method of service which would be effective."

Lang produced a copy of a 2003 writ of execution for $50,446 in Roche's libel suit, referencing a judgment against Lang entered on September 16, 1996. Roche's writ of execution names the defendant and judgment debtor as "Erik Lang" and his residence as P.O. Box 908 in Topanga. A sheriff's deed of sale of real property in November 2003 gives appellant's correct name.

On cross-examination, Lang testified that he did not respond to the 1995 libel lawsuit because "I wasn't served." His first response to the libel suit was to bring this action for equitable relief from a default judgment.

At the close of Lang's case, Roche made a motion for nonsuit on the grounds that Lang did not address the issue of whether he was properly served in the libel suit. The trial court indicated its intention to grant the motion because "there is no evidence with respect to the judgment in the [libel] case that you are attempting to void in terms of what happened there, what he did or didn't do, why service was bad. All you put on is

evidence of how he misspelled your name, and you had different P.O. boxes." Lang replied that he had made his claim with the introduction of documents. The court then granted the motion for nonsuit and gave judgment to Roche. Judgment was entered on May 8, 2006. This timely appeal ensued.

DISCUSSION

1. Adequacy of the Record

Roche raises several objections to the record on appeal. First, he argues that the appeal cannot proceed because Lang failed to include the operative pleading in the record. However, the adequacy of that pleading was at issue in Lang's first appeal, and we take judicial notice of our own records in the same case. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *In re Kinnamon* (2005) 133 Cal.App.4th 316, 319, fn. 2; *Dwan v. Dixon* (1963) 216 Cal.App.2d 260, 265.) Because we addressed the viability of Lang's complaint in the prior appeal, and Roche does not pretend that he is ignorant of the nature of Lang's claim, Lang's failure to include his complaint in the current record is unimportant.

Second, Roche asserts that the appellate record is devoid of trial exhibits. Lang requested the inclusion of the trial exhibits in his designation of the record on appeal. However, because the exhibits were returned to Lang at the conclusion of trial, he filed them with this Court under separate cover, as is permitted by the court rules. (Cal. Rules of Court, former rule 18(b)(2) ["Any party in possession of designated exhibits returned by the superior court must put them into numerical or alphabetical order and send them to the reviewing court . . ."].) Roche does not deny that the exhibits filed with this Court are in fact the same evidence that was admitted in the trial court.

2. Motion for Judgment

Roche made, and the trial court granted, a motion for nonsuit. However, as Roche now points out in his brief, nonsuits are granted in jury cases, and this was a bench trial. (*Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196, 1200 ["in a trial by the court a motion for nonsuit is not recognized."] The correct procedure is a motion for judgment. (*Ibid*.)

"After a party has completed his presentation of evidence in a trial by the court, the other party . . . may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634 . . . ." (Code Civ. Proc., § 631.8, subd. (a).)[1] The purpose of the motion for judgment "is to enable the court, after weighing the evidence at the close of the plaintiff's case, to find the plaintiff has failed to sustain the burden of proof, without the need for defendant to produce evidence." (*Ford v. Miller Meat Co., supra*, 28 Cal.App.4th at p. 1200.) The court's findings must be supported by substantial evidence. (*Ibid*.)

3. Grounds for Relief from Default

"A judgment may be set aside by a court if it has been established that extrinsic factors have prevented one party to the litigation from presenting his or her case. [Citation.] The grounds for such equitable relief are commonly stated as being extrinsic fraud or mistake. However, those terms are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342.)

If a judgment arises from an invalid service of process, the trial court has no jurisdiction to proceed or enter a default. The existence of a meritorious defense is not an issue if the defendant has been deprived of due process by reason of invalid service of summons. (*Peralta v. Heights Medical Center, Inc.* (1988) 485 U.S. 80, 85-87.) Consequently, a defendant who was never served in an action may have it vacated

---

[1] The trial court in this case did not issue a statement of decision. Despite the mandatory statutory language regarding the statement of decision, it is not required unless timely requested by a party. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140, fn. 10.) There is no indication in the record that Lang asked for a statement of decision "prior to the submission of the matter for decision." (Code Civ. Proc., § 632.)

"without establishing a meritorious defense" to the action. (*Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 206.)

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314.) "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. . . . [¶] It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers." (*Id*. at p. 315.)

4. Lang's Case for Relief

The evidence produced by appellant at trial showed the following: appellant's name is Erik Lang, not "Eric Lang." His mailing address was and is P.O. Box 908, Topanga, California. Roche was given this address for Lang in 1977, when Lang purchased property from Roche. They are neighbors. Roche knew the correct spelling of Lang's surname, based on the escrow instructions that were signed by both parties in 1977. Roche sued Lang in 1989, and spelled Lang's name correctly. Roche served appellant with notices in 1991 and 1992 at Lang's correct mailing address in Topanga. When Roche sued for libel in 1995, Roche used the incorrect spelling of "Eric"; he asked the court to publish service of summons under the incorrect spelling; and his attorney represented to the court that there was no known method to serve Lang. Lang testified that he was not served with the lawsuit. In 2003, Roche filed a writ of execution on the default judgment taken against Lang: Roche correctly spelled appellant's name and gave Lang's correct mailing address on the writ of execution.

"It appears respondent intentionally or unintentionally falsified the application for order for publication of summons by stating service could not be made pursuant to Code of Civil Procedure section 415.30, which authorizes service by mail. At the time respondent filed his application under 415.50, subdivision (b), respondent did not possess a residence or business address for appellant. However, at that time respondent did possess knowledge of a post office address for appellant and knew he was receiving mail at that post office address. Respondent may have believed it could not comply with section 415.30 by mailing to a post office box, yet no case law or statute supports such a belief." (*Transamerica Title Ins. Co. v. Hendrix* (1995) 34 Cal.App.4th 740, 744-745, fns. omitted.) If mailing summons is "reasonably feasible, any method of service less likely to provide actual notice is insufficient." (*Id.* at p. 745.) Failure to attempt mail service on a post office box prior to filing an application for order to serve summons by publication causes the request for such an order to be "defective as a matter of law. Respondent knew appellant's post office address and that his mail was being picked up from that box. Yet respondent did not attempt to serve appellant by mail." (*Id*. at p. 746.) As a result, "appellant's failure to file an answer to the improperly served complaint did not represent a default. It was error to enter default and beyond the power of the court to do so. The trial court had a legal duty, not merely discretionary power, to vacate the default it had erroneously entered." (*Ibid*.)

Lang's evidence was sufficient to survive a motion for judgment. Mailing summons to appellant's post office box was reasonably feasible. It has been appellant's mailing address since at least 1977, when he listed it in escrow instructions signed by both parties. Roche served Lang at that address in 1991 and 1992. Roche again used the Topanga post office box in 2003, when he collected on his default judgment. Roche must justify why he briefly failed to use Lang's mailing address—only long enough to serve notice by publication *under the wrong name*. Roche must justify why he sued appellant under the name "Eric Lang," when the evidence produced by Lang shows that Roche knew the correct spelling of appellant's name: Roche sued "Erik Lang" in 1989, and later executed on his default judgment under the name "Erik Lang" in 2003.

At the moment, we have Lang's "uncontradicted under oath statement [that] he was never served." (*Fidelity Creditor Service, Inc. v. Browne*, *supra*, 89 Cal.App.4th at p. 207, fn. 3.) Once Lang testified that he was not served, the burden shifted to Roche to show valid service. Because the motion for judgment was granted at the close of Lang's case, there was no evidence that Lang was served with the summons and complaint at a known mailing address or at his residence, proof that Roche must produce in his defense of this action. At the least, Roche must establish some compelling reason why he did not mail the summons and complaint to the post office box that he commonly used for Lang, both before and after the 1995 libel lawsuit.

There is evidence that Roche misrepresented the spelling of Lang's name to the court when he applied for an order for service by publication. We do not see how there could be valid service by publication if the wrong name is used for the defendant. Perhaps Roche can prove that Lang formally uses two different spellings of his name. Roche's use (or misuse) of the name "Eric" does not prove that appellant's name is "Eric." At this point, all we have is Lang's uncontradicted testimony that his name is spelled "Erik." Standing alone, without any contrary evidence of valid service, these facts suggest that the judgment is void. The trial court erred in granting judgment to Roche at the close of Lang's case.[2]

---

[2] Lang contends that he "got some special bad treatment by the judge" in this case. Lang may make a peremptory challenge to secure the assignment of a different judge following our reversal of the judgment. (Code Civ. Proc., § 170.6, subd. (a)(2); *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 Cal.App.4th 490, 496-497; *Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 423-424.)

DISPOSITION

The judgment is reversed. The case is remanded for a new trial on Lang's claim for equitable relief from the default judgment. Lang may recover his costs on appeal from Roche.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.